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MICHAEL J. DAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No. 77-1557

EARL A. GARNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S SUPPLEMENTAL BRIEF

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Pursuant to Rule 24(5) of the Rules of this Court, petitioner Earl Garner submits this supplemental brief to bring to the Court's attention certain proceedings taking place subsequent to the filing of his Petition for a Writ of Certiorari.

The principal question raised by the Petition arises from the trial court's admission into evidence of grand jury testimony of the government's leading witness against Garner, one Warren Robinson, after Robinson refused to testify at trial. The government conceded below, and the Court of Appeals held, that Garner was

denied an adequate opportunity to cross examine Robinson about his grand jury testimony.¹ Nevertheless, in spite of the fact that much of the testimony was double and triple hearsay, that it was the product of leading questions, that it had been given pursuant to a plea agreement, and that much of it contradicted the documentary evidence at trial, the trial court ruled it admissible under Fed.R.Evid. Rule 804(b)(5) on the grounds that it was "trustworthy." A divided Court of Appeals affirmed.

In June, 1978, the government indicted the "trustworthy" Robinson on two perjury counts in connection with his grand jury testimony.² *United States v. Robinson*, Criminal No. 78-120-A, E.D.Va., Alexandria Division, June 5, 1978. The government alleged in the indictment that Robinson's conflicting statements under oath concerning Garner's connection to a drug conspiracy amounted to perjury under 18 U.S.C. §1623 because "one of the declarations was necessarily false and known by him to have been false when made." Indictment, Count I, ¶9; Count II, ¶9. The two perjury counts against Robinson were subsequently dismissed in exchange for Robinson's guilty plea to a third count of contempt, deriving from Robinson's refusal to testify at Garner's trial. The indictment for perjury, however, ever, reflects the government's view of Robinson's credibility as a witness, for it is a "formal accusation of a person charging that he has committed an illegal act which is denounced by the sovereign as a crime." *Elder v. United States*, 142 F.2d 199, 200 (9th Cir. 1944).

¹ See Garner's Petition for a Writ of Certiorari, at Appendix 13a.

² Counsel for Garner learned of the indictment and plea only in August, 1978.

The recent indictment undermines the only basis upon which the government supports the admissibility of Robinson's grand jury testimony. It is intolerable legally and questionable ethically to indict Robinson as one who lies under oath and yet to maintain that Robinson's grand jury testimony was sufficiently trustworthy to be a worthy substitute for the right to cross examination. This is especially so in view of the stringent tests for trustworthiness under the Sixth Amendment, *see Dutton v. Evans*, 400 U.S. 74, 88-89 (1970) and which Congress enshrined in Rule 804(b)(5). Given the indictment of Robinson for perjury, the government should not now be heard to argue his "trustworthiness."

CONCLUSION

For the foregoing reasons, as well as those stated in Garner's Petition for a Writ of Certiorari, the Writ should be granted.

Respectfully submitted,

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